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January 12, 2015

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Federal Election Commission  
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COUNSEL

**Re: *Response of American Crossroads and Crossroads Grassroots Policy Strategies (GPS) in MUR 6888***

Dear Mr. Jordan,

This response to the Complaint designated Matter Under Review 6888 is submitted on behalf of American Crossroads and Crossroads Grassroots Policy Strategies (GPS) by the undersigned counsel. American Democracy Legal Fund filed the initial complaint in this matter on or about October 15, 2014, and then filed a supplemental complaint naming additional respondents on or about October 28, 2014.<sup>1</sup>

American Crossroads is registered with the Commission as an independent expenditure-only committee ("IEOC" or "Super PAC"). Crossroads Grassroots Policy Strategies (Crossroads GPS) is organized pursuant to Internal Revenue Code § 501(c)(4) and operates primarily for the promotion of social welfare. The Commission determined

<sup>1</sup> American Democracy Legal Fund is a recently established Internal Revenue Code § 527 organization created by David Brock to serve as an "overtly partisan watchdog group." Kenneth P. Vogel, *Media Matters' David Brock expands empire*, Politico (Aug. 13, 2014), <http://www.politico.com/story/2014/08/david-brock-citizens-for-responsibility-and-ethics-in-washington-110003.html>. Mr. Brock claims to believe that "our experience has been that the vast amount of violations of the public trust can be found on the conservative side of the aisle." *Id.* His new organization exists solely to harass Republicans and conservatives with frivolous complaints and sensational allegations. (The Complainant maintains a running tally of all the individuals and organizations it has attacked on its website, at <http://americandemocracy.org/>.) Complainant's day-to-day affairs are managed by Brad Woodhouse, who has a long history with the Democratic Senatorial Campaign Committee and the Democratic National Committee, and more recently, with American Bridge 21st Century, which is linked to George Soros and David Brock.

in MUR 6396 that Crossroads GPS is not subject to FEC regulation as a "political committee," as that term is used in the Federal Election Campaign Act.

American Crossroads and Crossroads GPS are scarcely mentioned in the news articles, op-eds, and blog postings referenced in the Complaint. None of these sources includes any information about *how* American Crossroads and Crossroads GPS allegedly interacted with GOP Data Trust LLC's ("Data Trust"),<sup>2</sup> or provides any evidence that such alleged interaction yielded communications that were coordinated with candidates or party committees. The Complaint is purely speculative with respect to the activities of American Crossroads and Crossroads GPS and should be dismissed accordingly.

We note at the outset that neither American Crossroads nor Crossroads GPS has ever contracted with i360, LLC ("i360"), and i360 does not, and has not in the past, provided data services to American Crossroads or Crossroads GPS. As explained in more detail below, the data sharing agreement entered into by and between Data Trust and i360 in August 2014 did *not* include data provided by American Crossroads or Crossroads GPS to Data Trust, and we have no reason to believe that data provided by American Crossroads and Crossroads GPS to Data Trust was subsequently shared with i360.

Both American Crossroads and Crossroads GPS deny the Complaint's allegations of any and all improper or unlawful activities. The Complainant's description of how American Crossroads and Crossroads GPS allegedly used Data Trust's services is generally inaccurate. Neither Respondent coordinated any communications or expenditures with any of the named respondents, be it the Republican National Committee or any of the identified state political parties or federal candidates. Finally, with respect to the Commission's coordinated communication regulations, *even if* the Respondents had engaged in the activities alleged in the Complaint, based on our interactions with Data Trust, Data Trust does not constitute a "common vendor" under the Commission's regulations. In short, the factual allegations upon which this Complaint is based are incorrect, and even those incorrect facts do not establish a legal violation under the Commission's regulations. This Complaint should be dismissed as expeditiously as the Commission's processes allow.

## **I. FACTUAL BACKGROUND**

### **A. What Is Data Trust?**

Data Trust maintains a database of registered U.S. voters and offers this product to its customers, such as American Crossroads and Crossroads GPS. The company

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<sup>2</sup> The Complaint abbreviates "GOP Data Trust LLC" to "Data Trust," and we do the same in this Response. As described in more detail below, American Crossroads and Crossroads GPS have contractual agreements for data services with GOP Data Trust, LLC, which is organized in Delaware.

compiles, stores, and manages information about registered voters, and sells access to that information to its clients. As Data Trust's website explains:

our national file includes over 260 million Americans across all 50 states, and is updated on a daily basis. Our political data inventory goes back decades and includes historical election results, voter registrations, voter scoring projects, census data, list collection and voter contact results.<sup>3</sup>

Elsewhere on its website, Data Trust explains that its "national voter file (50 states + DC) includes" information regarding: age/gender/demographics; geographic; political-affiliations; contact (mailing, phone, email); and vote history. Data Trust continuously improves this database with the following types of information: voter scoring; national change of address processing; address standardization and CASS certification; geocode and census block assignment; landline, cell phone and email appends; organization/coalition lists; and consumer data (lifestyle, financial, etc.).<sup>4</sup>

Data Trust houses a large amount of information about voters. To the best of our knowledge, a client must determine for themselves what information in Data Trust's database is, or would be, valuable to *that client*. Data Trust has never provided that sort of consulting service to either American Crossroads or Crossroads GPS. In the experiences of American Crossroads and Crossroads GPS, and to the best of our knowledge, Data Trust's database is *not* a repository for "non-public strategic campaign and party data."<sup>5</sup> Complaint at 2. Both American Crossroads and Crossroads GPS understand Data Trust to be a repository for *raw data* about voters, and there is nothing inherently "strategic" about any of this raw voter data. Data Trust provides access to raw data; American Crossroads and Crossroads GPS unilaterally determine the "strategy" by which they deploy this raw data in furtherance of each group's unique purposes and goals.

#### **B. American Crossroads and Crossroads GPS Vendor Relationship with Data Trust**

American Crossroads and Crossroads GPS have had contractual relationships with Data Trust for periods beginning in May 2012, during which Data Trust served as a vendor to American Crossroads and Crossroads GPS. Affidavit of Carl Forti at ¶ 2. American Crossroads and Crossroads GPS have never contracted with i360, LLC, and i360, LLC, has never provided services to American Crossroads or Crossroads GPS. Affidavit of Carl Forti at ¶ 3.

<sup>3</sup> Data Trust website, <http://www.gopdatatrust.com/> (main landing page, last visited January 10, 2015).

<sup>4</sup> Data Trust website, <http://www.gopdatatrust.com/> ("Products & Services," last visited January 10, 2015).

<sup>5</sup> Complainant also claims that Data Trust houses "non-public, *strategically material* data." Complaint at 2 (emphasis added).

American Crossroads entered into its first contract with Data Trust in May 2012, and this contract was in effect through December 31, 2012. American Crossroads entered into this contract after determining that the cost of developing its own voter file would be significantly greater than Data Trust's licensing fees. Pursuant to this agreement with Data Trust, American Crossroads became a non-exclusive licensee of Data Trust's data. American Crossroads was licensed to use this data for the purpose of contacting individuals in connection with American Crossroads' political, advocacy, or educational activities. The contract did not convey any ownership or proprietary rights in Data Trust's data.

As a licensee, American Crossroads was permitted to correct, enhance, and modify the accessed data – i.e., “improve” the data by updating it with new data obtained through the licensee’s use of the data. American Crossroads would then own and have title to these improvements, and as part of the contract, would return any improvements or modifications to Data Trust on a quarterly basis and grant a license to Data Trust to use the improvements for its own purposes. This data enhancement arrangement, whereby American Crossroads returned updated, corrected, or enhanced data to Data Trust, was part of the contract’s consideration.<sup>6</sup> The other part of the consideration was the payment by the licensee of a licensing fee.

American Crossroads’ 2012 contract with Data Trust provided that American Crossroads could provide access to Data Trust’s data to Crossroads GPS as a sub-licensee, provided that Crossroads GPS adhered to the same contractual terms as an additional licensee. American Crossroads and Crossroads GPS each paid a pro rata share of the total licensing fee, as reflected in Exhibits B and C of the Complaint.

American Crossroads and Crossroads GPS entered into separate contracts with Data Trust in 2014, and both contracts are effective through the end of the year. The terms of both contracts are substantially similar to the 2012 contract, and both contracts provide the licensee with access to “voter registration and consumer profile Data for all registered voters in the United States and all updates thereto during the term of this Agreement.” Each licensee is authorized “[t]o review, analyze, and enhance Data for the purpose of contacting individuals contained in the Data through phone calls, text messages, electronic mail, written correspondence, mailing, and any other means of communication with respect to” each licensee’s non-commercial activities.

Pursuant to each contract, “Data provided to [the] Licensee ... may be reviewed analyzed, or enhanced,” and the “Licensee agrees to correct, enhance, and modify the Data, combine the Data with other data, and receive data from Responding Contacts.”

<sup>6</sup> The Commission has been aware of this sort of commercial arrangement for over a decade, and perhaps longer. See Notice of Proposed Rulemaking on Mailing Lists of Political Committees, 68 Fed. Reg. 52, 531, 52, 533 (Sept. 4, 2003) (“The Commission also seeks comment on whether it is usual and customary in the commercial list marketplace for one entity to provide raw list data to another entity that updates and enhances the data and where both entities consequently have access to the list.”). In the time since 2003, the Commission has never indicated that these arrangements are impermissible under Commission regulations.

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("Responding Contacts" includes contributors, volunteers, and other persons expressing an affirmative interest in the programs of Licensee....") Data corrections, enhancements, and modifications are to "be returned to [Data Trust] on a timeline mutually agreed upon ... or within 30 days of the termination of this Agreement." The contracts *do not* require "real time" updates from American Crossroads or Crossroads GPS.

**C. American Crossroads' and Crossroads GPS's Use of Data Trust's Database**

Both American Crossroads and Crossroads GPS accessed and used Data Trust's database in a manner consistent with the contractual terms described above. This use bears almost no resemblance to the story told in the Complaint.

**1. 2014**

American Crossroads and Crossroads GPS made independent expenditures in connection with both U.S. Senate and U.S. House elections in 2014. The organizations used the Data Trust database differently for Senate and House elections. Both uses are detailed below.

**a. Senate Elections**

In advance of the regular 2014 U.S. Senate elections, American Crossroads and Crossroads GPS requested access from Data Trust to voter files for several states in which Senate elections would take place. Both organizations informed a second vendor, Target Point Consulting ("Target Point"), which state voter files should be accessed, and Target Point formally placed the requests with Data Trust. The requested voter files were delivered directly to Target Point. Neither American Crossroads nor Crossroads GPS has direct access to Data Trust's database. Affidavit of Carl Forti at ¶ 4.

Following Target Point's request for data on behalf of American Crossroads and Crossroads GPS, Data Trust transmitted the requested files directly to Target Point. The files requested and delivered consisted of the voter files for entire states. For example, Data Trust's entire file of North Carolina voters, regardless of party registration, was delivered to Target Point in 2014. Target Point performed a "microtargeting" analysis on each voter file provided by Data Trust. Target Point's deliverable to American Crossroads or Crossroads GPS was a summary and analysis of the microtargeting results, followed by a description of various categories of persons that could be communicated to by American Crossroads or Crossroads GPS. For example, in a given state, Target Point's analysis might lead it to highlight "male independent voters between 45-60 years old" as a recommended target group. At that point, American Crossroads or Crossroads GPS (not Data Trust or Target Point) would unilaterally determine which groups should be targeted – subject to a variety of strategic, policy and budgetary considerations – and these targeting decisions would then be translated into mailing and phone lists that are derived from the files provided by Data Trust. Data Trust's voter file database contains data "fields" for each voter, and by selecting the right combination of fields, Data Trust

can generate a list of "male independent voters between 45-60 years old." This list then serves as American Crossroads' or Crossroads GPS's mailing or phone list. This process yields *only* the list of persons with whom American Crossroads or Crossroads GPS wishes to communicate via mail or phone, not the internally strategic reasons for either American Crossroads or Crossroads GPS to communicate with them. The substantive message that is subsequently delivered to these individuals is developed entirely separately, and entirely independently, with no involvement from Data Trust or any candidate or political party committee.

Once Target Point's work on each voter file was complete, those files were not revisited. ~~Specifically, no effort was made to re-analyze any voters files at a later date in~~ the hopes that new information provided by another organization would be found in the voter file. In other words, American Crossroads and Crossroads GPS were *not* engaged in any "ongoing exchange of non-public strategic campaign and party data," and *never* returned to Data Trust's database in the hopes of making use of "highly-valuable voter data shared by the RNC and Republican campaigns when developing their independent expenditures." Complaint at 2, 8. Each organization used Data Trust's voter files once, and only once.

In short, Data Trust had nothing to do with the strategic decisions that American Crossroads and Crossroads GPS ultimately made with respect to targeting individuals with particular messages. The data that informed those decisions was generated by Target Point on behalf of American Crossroads and Crossroads GPS, and Target Point's analytical work occurred wholly separate and apart from Data Trust. The substantive messages to be delivered to targeted individuals were then developed independently of Data Trust and any candidate or political party committee. Affidavit of Carl Forti at ¶ 6.

When Target Point's work on each state voter file is completed, the results of Target Point's microtargeting surveys are delivered back to Data Trust for incorporation into its database.<sup>7</sup> This new data that was delivered to Data Trust is not identified subsequently within Data Trust's database as having been generated or provided by American Crossroads or Crossroads GPS. In other words, no other Data Trust user can "see" what American Crossroads or Crossroads GPS provided to the database because database information is not cataloged in that manner. However, if another Data Trust client were to then request the same portion of the voter file, the delivered file would

<sup>7</sup> A microtargeting analysis is generally based on phone surveys to a representative sampling of individuals. These surveys are designed to generate a wide variety of information about the sample, including but not necessarily limited to, policy and political preferences. The results of the survey and subsequent analysis are then applied beyond the sample to individuals who satisfy the same criteria as the individuals within the sample. For example, if the microtargeting survey and subsequent analysis finds that females aged 35-45 who drive a certain type of car and read a certain magazine have a strong tendency to feel a certain way about health care policy, then that finding regarding health care policy is applied to *all* individuals with the same relevant characteristics. The data returned to Data Trust by American Crossroads and Crossroads GPS consists of the survey participants' responses to the phone survey questions, along with the applied findings described above.

include the additional data previously delivered by American Crossroads or Crossroads GPS. As noted, however, the user would have no way of knowing that the file had been enhanced by American Crossroads or Crossroads GPS.

The manner in which American Crossroads and Crossroads GPS used Data Trust's database did not involve any "real time exchange of non-public, strategically material data." Complaint at 2. American Crossroads and Crossroads GPS certainly did not view or otherwise use any "non-public, strategically material data" allegedly provided to Data Trust by any candidate or political party committee. Rather, American Crossroads and Crossroads GPS engaged Data Trust as a vendor for the purpose of licensing access to raw data about registered voters (the nature of which is detailed above), and engaged Target Point to perform analyses on select files downloaded from Data Trust's database.

American Crossroads' and Crossroads GPS's strategic decisions about the content and targeting of certain public communications were informed by, though not controlled by, Target Point's independent analytical work. Affidavit of Carl Forti at ¶ 6. More specifically, the Target Point's work served to narrow the list of individuals that each organization would contact. American Crossroads and Crossroads GPS did not choose to target any specific individuals on the basis of information supposedly gleaned from the Republican National Committee, or various state party or candidate committees. That is not how American Crossroads or Crossroads GPS used the Data Trust database, and, moreover, we do not believe it would have been possible to use Data Trust's data as the Complaint alleges. *If* one or more of the data files requested from Data Trust for use by Target Point included any enhancements or other information provided by the Republican National Committee, a state party committee, or a candidate committee, neither American Crossroads nor Crossroads GPS was aware of it, and neither organization used that *particular* information for any particular purpose. American Crossroads and Crossroads GPS based their targeting decisions on Target Point's secondary voter identification analyses, and not on any information present in Data Trust's data files prior to those analyses. There is no factual basis for the Complainant's conclusion that American Crossroads' or Crossroads GPS's advertising was "coordinated" with candidate or political party committees through Data Trust as a "common vendor." See Complaint at 2-3.

As noted above, Data Trust's database is used by American Crossroads and Crossroads GPS, after analysis by Target Point, to create targeted mailing and phone lists. However, many of the expenditures listed in the Complaint's exhibits are for television and radio advertisements. American Crossroads and Crossroads GPS do not use Data Trust, or Data Trust's voter database, in connection with its television and radio advertising. American Crossroads and Crossroads GPS make television and radio advertising decisions on the basis of internal research, commissioned polling results, and creative input from staff and consultants. (The commissioned polling that informed television and radio advertising decisions was entirely separate and distinct from the microtargeting surveys described above.) The television or radio advertisements reflected in the expenditures included in the Complaint's exhibits were developed and

distributed with absolutely no input from Data Trust, and in a manner that in no way involved any information in Data Trust's voter database. Affidavit of Carl Forti at ¶ 7.

**b. House Elections**

American Crossroads made independent expenditures for mailers in connection with two U.S. House elections in 2014 (IL-13 and IL-17). In each instance, American Crossroads' mail consultant/vendor, who had no connection with Data Trust, reviewed polling data and recommended target "universes." Once American Crossroads approved these recommendations, the consultant/vendor obtained the names and addresses of voters who fell within these universes from the Data Trust database, on American Crossroads' behalf. Affidavit of Carl Forti at ¶ 5. The selected universes were demographic in nature. For example, in one case, American Crossroads targeted independent men aged 55 and older within a particular Congressional district, while in another case, the targeted universe was simply independent voters within the district. This selective use of the Data Trust database obviously does not involve the sort of illicit information sharing that the Complainant alleges.

Crossroads GPS made independent expenditures for mailers, television, and radio in connection with one U.S. House election in 2014 (NV-04). Crossroads GPS adhered to the same process for its mailers as described in the paragraph above. Affidavit of Carl Forti at ¶ 5. As explained above, American Crossroads' and Crossroads GPS's production and distribution of television and radio advertising did not involve Data Trust in any way.

**2. 2014 Special Election, FL-13**

The Complaint alleges "an extensive data sharing program between party and supposedly independent organizations" in connection with the March 11, 2014, special election in Florida's 13th Congressional District. Complaint at 9. According to the Complaint, "American Crossroads, apparently working off the same RNC Data Trust voter file, spent \$471,012.28 on advertisements in the [FL-13 special election] that they claimed were 'independent expenditures.'" *Id.* at 10.

American Crossroads made independent expenditures in connection with the FL-13 special election. American Crossroads reported expenditures for mailings on February 5, 7, 11, 14, and 18, and for phone calls on March 8. Target Point did not perform any microtargeting analysis for this special election. Instead, with respect to these mailers and phone calls, American Crossroads targeted voters who had requested absentee ballots. The absentee ballot request list was obtained from Florida election officials, and American Crossroads then used Data Trust's database to match mailing addresses and phone numbers to this absentee ballot request "universe." Affidavit of Carl Forti at ¶ 8.

American Crossroads also reported television advertising expenditures on February 18, February 25, and March 4. (These television expenditures totaled approximately \$345,815 of the \$471,012.28 that the Complainant alleges American



Crossroads spent.) As explained in the section above, American Crossroads' television advertising has nothing to do with Data Trust or Data Trust's database.

Crossroads GPS did not make any expenditures or disbursements in connection with the FL-13 special election. American Crossroads developed its own voter targeting program – voters who requested absentee ballots – which did not rely on any “strategic” information from any other entity to implement.

### 3. 2012

~~American Crossroads' and Crossroads GPS's use of Data Trust's database in~~  
2012 was the same as in 2014, and matched the processes described above. Target Point Consulting performed the same services in the same manner. Affidavit of Carl Forti at ¶ 10.

#### D. Neither American Crossroads Nor Crossroads GPS Has A Contractual Relationship With i360

As noted above, neither American Crossroads nor Crossroads GPS has ever contracted with i360, and neither organization has ever utilized the services provided by i360. Affidavit of Carl Forti at ¶ 3.

The Complaint asserts, and we do not dispute, that Data Trust and i360 agreed to a data sharing arrangement in late August 2014. *See* Complaint at 6. The voter identification and data enhancements created by American Crossroads or Crossroads GPS, as described in the section above, were *not* included in the data sharing arrangement. The question of whether American Crossroads' and Crossroads GPS's microtargeting-based enhancements were to be included in the Data Trust/i360 data sharing arrangement was specifically addressed in August 2014, and Data Trust, American Crossroads, and Crossroads GPS agreed that that data would *not* be included, and would *not* be shared with i360. Affidavit of Carl Forti at ¶ 9. Accordingly, clients of i360 did not have, and do not have, access to any of American Crossroads' or Crossroads GPS's 2014 microtargeting-based data enhancements.

#### E. Complainant's Allegations Regarding How American Crossroads and Crossroads GPS Use Data Trust Are Not Sourced, and Are Uninformed and Inaccurate

In light of the foregoing explanation of how American Crossroads and Crossroads GPS have used Data Trust's database, it is evident that the Complaint's allegations are simply untrue.

The Complainant's most specific account of how the Respondents supposedly coordinated with each appears on page eight of the initial Complaint. This account begins with a passage from an op-ed that was published in the *Wall Street Journal* in late September 2014. (It is unclear whether this op-ed described what was actually being

done, or what the columnist's sources hoped would or could be done.) Based on this passage, the Complainant concludes, "other groups *presumably* then use this highly-valuable data shared by the RNC and Republican campaigns when developing their independent expenditures supporting those candidates." Complaint at 8 (emphasis added). Any such presumption is mere speculation.

Complainant alleges that "[t]he outside groups know exactly who the Republican Party and Republican campaigns need them to target and what they should say, because they are working from the party and candidate data." Complaint at 10-11. American Crossroads and Crossroads GPS have no information about how other organizations used Data Trust or i360. However, American Crossroads and Crossroads GPS do not believe that "the Republican Party and Republican campaigns" convey to "outside groups" through Data Trust who should be targeted, and with what message. In our experience, that is not how the Data Trust database works, or how it is used. No candidate or party committee conveyed any information to American Crossroads and/or Crossroads GPS through Data Trust about who they "need them to target and what they should say." As detailed above, American Crossroads and Crossroads GPS made all content and targeting decisions independently and on the basis of their own research and analysis.

Complaint is also incorrect when it claims that "[b]y examining party and candidate data immediately and day to day, the outside groups that are required to operate independently can easily determine who the party and candidates are targeting, which areas they are focusing their efforts, where their field programs have holes and need additional support, and the equivalent of insider polling – essentially the entire private field strategy of a campaign or party operation." *Id.* at 11. Again, American Crossroads and Crossroads GPS have no information about how other organizations use Data Trust or i360. With respect to American Crossroads and Crossroads GPS, however, not one word of Complainant's allegation is accurate, correct, or even informed. As explained above, American Crossroads and Crossroads GPS did not use Data Trust for any of these purposes, and the Complainant presents no evidence whatsoever that either American Crossroads or Crossroads GPS took any of these actions.

The Complainant also claims that "the RNC is telegraphing, on a movement-by-movement basis, which types of voters it is talking to, how it is structuring its field, outreach and targeting, and its overall strategy for voter contact and persuasion. This allows supposedly 'independent' groups to track, in real time, Republican campaigns' voter contact activities, down to which doors it is knocking an [sic] which phone numbers it is dialing in a given day but also get the big picture of its inside strategies." Complaint at 13. Again, American Crossroads and Crossroads GPS have no information about how other organizations use Data Trust or i360, but American Crossroads and Crossroads GPS did not use Data Trust's database as a resource for reading what the RNC was allegedly "telegraphing." Complainant has presented absolutely no evidence that any of this actually occurred. American Crossroads and Crossroads GPS have no idea if it would even be possible to "track, in real time," or even in less than real time, the RNC's activities, but, in any event, American Crossroads and Crossroads GPS used Data Trust's database only in the manner described above.

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Complainant generally alleges that *all* of American Crossroads' advertising from May 2011 through October 2014 was "coordinated," and that all of Crossroads GPS's advertising from July 2012 through October 2014 was "coordinated." Complainant does not, however, identify with any particularity any one instance in which American Crossroads or Crossroads GPS obtained a particular piece of material, non-public information through Data Trust and then used that information in connection with the creation, production, or distribution of a public communication. Rather, Complainant generally alleges that American Crossroads or Crossroads GPS utilized "the RNC's own data – via the common vendor, Data Trust – to produce targeted communications aimed specifically at persuading voters to support the RNC's candidates in an upcoming election." According to the Complaint, "~~it appears that any independent expenditures~~ made by American Crossroads, Crossroads GPS or AFP that are based on data obtained through the Data Trust or i360 are, in fact, coordinated communications with the RNC and other campaigns providing data into the system." Complaint at 14 (emphasis added).<sup>8</sup> In other words, *if* American Crossroads and Crossroads GPS coordinated with the RNC, *then* their ads were coordinated communications.

Thus, rather than the Complainant producing actual evidence that a specific communication is a coordinated communication, the Complainant instead alleges that *all* of the Respondents' communications that were "based on data obtained through the Data Trust or i360" are coordinated communications, notwithstanding the fact that Complainant has no idea what information is in these databases, or how that information is, or can be, used. On the basis of this theory, the Complainant would like the Commission to undertake an investigation that would force the respondents to prove a negative with respect to every single one of their advertisements.

Complainant fails to mention that many of the reported expenditures listed in the Complaint's exhibits are for television and radio advertisements. Data Trust's database has absolutely nothing to do with American Crossroads' and Crossroads GPS's development, production, and placement of radio and television advertising.<sup>9</sup>

<sup>8</sup> As noted above, the Complainant's reliance on the use of "data obtained through the Data Trust or i360" is misplaced. The Commission's coordination regulations focus on the conveyance and use of "*information about the campaign plans, projects, activities, or needs*" of a candidate or party committee. "Data," as understood in the context of the Data Trust database, is only relevant here to the extent that that "data" either is or conveys "*information about the campaign plans, projects, activities, or needs*" of a candidate or party. The Commission should not accept the Complainant's assertion that there is any such thing as "strategic campaign and party data." See Complaint at 2. This is a phrase and concept that the Complainant has introduced in the hopes that the Commission will overlook the obvious fact that there is a crucial difference between "*information about the campaign plans, projects, activities, or needs*" of candidates and parties and the raw data about voters that is contained in a database.

<sup>9</sup> Both organizations base their decisions about television and radio advertising on their own research, polling data, and creative recommendations from consultants, none of which is derived in any way from Data Trust's database.

## II. COMPLAINANT'S ALLEGATIONS CANNOT SUPPORT A REASON TO BELIEVE FINDING

As the Commission previously explained, "The Commission may find 'reason to believe' only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the FECA. Complaints not based upon personal knowledge must identify a source of information that reasonably gives rise to a belief in the truth of the allegations presented. . . . Unwarranted legal conclusions from asserted facts . . . or mere speculation . . . will not be accepted as true." MUR 4960 (Clinton), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 1-2; *see also* MUR 5878 (Arizona State Democratic Central Committee), Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen at 5 (quoting MUR 4960); MUR 5467 (Moore), First General Counsel's Report at 5 (quoting MUR 4960).

"The RTB standard does not permit a complainant to present mere allegations that the Act has been violated and request that the Commission undertake an investigation to determine whether there are facts to support the charges." MUR 6056 (Protect Colorado Jobs, Inc.), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at 6, n.12. "[O]pening an investigation to determine whether we could discover a basis for those suspicions runs counter to the statutory constraints imposed on the Commission." MUR 6296 (Buck), Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen at 4.

Finally, "under the Act, before making a reason-to-believe determination, the Commission must assess both the law and the credibility of the facts alleged. To do so, the Commission must identify the sources of information and examine the facts and reliability of these sources to determine whether they 'reasonably [give] rise to a belief in the truth of the allegations presented.' Only if this standard is met may the Commission investigate whether a violation occurred." MUR 6371 (O'Donnell), Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen at 4; *see also* MUR 6296 (Buck), Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen at 5-6.

The Complaint is premised on a few vague quotations from Republican Party spokespersons,<sup>10</sup> several media reports in which reporters interpret those quotations and draw some highly questionable conclusions,<sup>11</sup> and the Complainant's own speculation. American Crossroads and Crossroads GPS are barely mentioned in the articles, op-eds, and blog pieces cited in the Complaint, so there is very little in those materials that

<sup>10</sup> See Complaint at 2 (quoting Washington Post piece that quotes RNC spokesperson who says the RNC wants to "share that [information] with everyone on our side").

<sup>11</sup> It is apparent from the articles cited in the Complaint that none of the reporters claim to have actually witnessed a client using Data Trust or i360.

requires a response. With respect to the activities of American Crossroads and Crossroads GPS, the Complaint's allegations are not based on any identified source and are purely speculative.

To the extent that the Complainant draws any conclusions from any of their cited materials as to how American Crossroads and Crossroads GPS used the information in Data Trust's database, those conclusions are incorrect. The Complainants do not claim to have any personal knowledge of the matters raised in the Complaint. As three Commissioners observed in another matter, "if this complaint sufficed to find reason to believe that coordination occurred and thereby launch a federal investigation, it is hard to imagine any allegations, no matter how unsubstantiated, that would not trigger the reason to believe threshold." MUR 6296 (Buck), Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen at 1.

The Complainant evidently hopes that the Commission will bless a fishing expedition into each and every one of American Crossroads' and Crossroads GPS's independent expenditures, to determine precisely what information was used to create, produce, and distribute those expenditures, and from where that information was derived. Not only has the Complainant failed to allege the specific facts required to support a reason to believe finding, but the Complainant has also failed to identify a viable legal theory to support its conclusory assertions that impermissible coordination has occurred. In light of the foregoing, there is not a "sufficient legal justification to open an investigation to determine whether there is probable cause to believe that a violation of the Act has occurred." MUR 6056 (Protect Colorado Jobs), Statement of Reasons of Commissioners Cynthia L. Bauerly and Ellen L. Weintraub at 2.

### **III. LEGAL ANALYSIS**

#### **A. Respondents' Contractual Arrangements With Data Trust Are Entirely Consistent With The Act And Commission Regulations**

Despite the Complainant's inaccurate statements to the contrary, the modern, commercial data vendor – such as Data Trust or Catalist – provides services that are entirely consistent with longstanding Commission precedent.

##### **1. Data Trust Is A Commercial Vendor**

Data Trust is a commercial vendor<sup>12</sup> that sells a product. American Crossroads and Crossroads GPS purchase that product from Data Trust in exchange for monetary fees and other consideration that were established through arms-length business transactions. These arrangements are memorialized in a series of written contracts.

<sup>12</sup> See 11 C.F.R. § 116.1(d) ("commercial vendor means any persons providing goods or services to a candidate or political committee whose usual and normal business involves sale, rental, lease or provision of those goods or services").

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Arms-length commercial transactions between a vendor and a committee or organizational client are not FEC-regulated arrangements. American Crossroads and Crossroads GPS pay commercially reasonable licensing fees to Data Trust for access to its database. The licensing fees were the result of negotiations between the parties.

The Commission previously explained that it:

has relied on several signposts for ensuring that an arrangement between a political committee and another person constitutes a *bona fide* transaction, rather than serving as a vehicle for making a contribution to the committee. One of the most important of these signposts is whether the transaction represented a bargained-for exchange negotiated at arm's length. For example, the list rentals at issue in AO 2002-14 were approved on the condition that the lists be 'leased at the usual and normal charge in a *bona fide*, arm's length transaction.' The very concept of 'fair market value,' which is virtually identical to the concept of 'usual and normal charge' as defined in the Commission's regulations, is defined by Black's Law Dictionary as '[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's length transaction.' Black's Law Dictionary 1549 (7th ed. 1999).

Notice of Proposed Rulemaking on Mailing Lists of Political Committees, 68 Fed. Reg. 52,531, 52,533 (Sept. 4, 2003).

American Crossroads' and Crossroads GPS' relationship with Data Trust is one in which each organization purchases a product from a for-profit entity that is engaged in *bona fide* commercial activity. The Commission has repeatedly determined that "*bona fide* commercial activity" is "outside the scope of the Act's regulation." Advisory Opinion 2014-06 (Ryan for Congress).

## **2. List Rentals and Exchanges**

The Complaint asserts that "[t]he fact that the Republican party and candidate data is shared with the outside groups in real time leads to further coordination." Complaint at 11. Assuming solely for the sake of argument that this allegation were true, and not the product of ill-informed speculation, the Complainant fails to acknowledge that the Commission has long approved of data sharing arrangements between candidates, party committees, and "outside groups." There are any number of ways for entities to exchange list information, notwithstanding the fact that the Complainant claims it is impermissible.

Organizations have long been permitted by the Commission to rent lists from each other, or to simply exchange data. At its most basic level, a "list exchange" is the

swapping of supporter lists of equal fair market value.<sup>13</sup> In 2002, the Commission explained that a national party committee could:

exchange its mailing lists or portions of its mailing lists of equal value with any outside organization, including political committees under the Act, Section 527 organizations (including state and local campaign, PAC, and party organizations), 501(c)(3) and (c)(4) groups, non-profit and for-profit corporations, and labor organizations, provided that the lists or the portions of the lists that are exchanged are of equal value. When such exchanges of equal value occur, which are non-reportable events under the Act, no "contribution, donation, or transfer of funds or any other thing of value" takes place under 2 U.S.C 441i(a), 11 CFR 300.10(a), or any other provision of the Act or the Commission's regulations.

Advisory Opinion 2002-14 (Libertarian National Committee). This holding did not break new legal ground. Thirty-three years ago, the Commission agreed that:

Two commercially acceptable ways of "paying for" the use of another organization's mailing list are 1) for the user to pay the list owner a fee "determined by the market's view of the value of the list;" and 2) for the user to exchange names of corresponding value with the list owner. The exchange may be a direct exchange of the same number of names, a multiple use of a smaller number of names or some other variation which the parties believe is an exchange of equal value. Both payment methods, you indicate, are accepted in the industry as full consideration.

Advisory Opinion 1981-46 (Dellums) at 1.

Assuming solely for the sake of argument that the Respondents are actually "sharing" data as the Complainant alleges, this data sharing would be perfectly permissible between any two Respondents under the Commission's long-standing "list exchange" holdings, so long as the data provided by one organization is of equal fair market value to the data provided in return from the other organization. *See id.*

The Commission has also approved several variations of the basic "list exchange" concept. For example, the Commission concluded in *Dellums* that the exchange of data does not have to take place contemporaneously, and approved "a current use of names in exchange for a future use of the names of another political committee." *Id.* at 2. More recently, the Commission considered what appears to be a "list enhancement" agreement, but divided for unexplained reasons. *See* MURs 6474 and 6534 (Mandel).

The *Dellums* opinion also made clear that the critical question of whether an exchange is of "equal value" is a matter of "accepted industry practice." *Id.* ("the Commission concludes that if the exchange of names on a contributor list is an exchange

<sup>13</sup> In its most basic form, a list exchange consists of a simultaneous, one-for-one swapping of supporter names and contact information.

of names of equal 'value' according to accepted industry practice, the exchange would be considered full consideration for services rendered"). The "accepted industry practice" approach wisely allows for those practices to change over time, and does not limit itself to then-current technology. The *Dellums* opinion has been cited approvingly since 1981, and just a few months ago, the Commission reaffirmed that it "has long recognized that a political committee's mailing lists ... are frequently sold, rented, or *exchanged in a market.*" Advisory Opinion 2014-06 (Ryan for Congress) (emphasis added).

Thus, under longstanding Commission precedent, every Data Trust client *could* obtain all of the same information that is allegedly being "shared" with other Data Trust clients by entering into a series of list exchange agreements. Every Data Trust client could also obtain all of the same information from a list broker who is able to secure access and brokerage rights to each of Data Trust's clients' lists. These approaches would admittedly be burdensome, but the *exact same* "data sharing" result that is alleged to be at the heart of this Complaint could be obtained through a series of list exchanges and/or rentals.

**B. The Complaint Contains No Specific Information Suggesting That Either American Crossroads Or Crossroads GPS Coordinated Any Expenditure With Any Party or Candidate Committee**

The Complaint does not specifically identify a single expenditure made by American Crossroads or Crossroads GPS that was allegedly coordinated with the Republican National Committee or any campaign committee. Rather, the Complainant attaches a list of *all* of American Crossroads' and Crossroads GPS's independent expenditures and claims that "any 'independent expenditures' made by American Crossroads, [or] Crossroads GPS ... that are based on data obtained through the Data Trust or i360 are, in fact, coordinated communications with the RNC and other campaigns providing data into the system." Complaint at 14. (This allegation can be reduced to the unremarkable proposition that if any of these independent expenditures were coordinated, then they are coordinated communications.) The Complaint contains no other details to support an allegation that any particular communication was coordinated with a party or candidate committee and conveniently ignores the fact that the Data Trust sells only data, not communications. The Complaint does not identify the information that was allegedly shared in the course of coordinating any particular advertisement. Rather, the Complaint broadly alleges "a massive scheme," which "may only be the tip of the iceberg." Supplemental Complaint at 9; Complaint at 14. We are not aware of any instances in which the Commission has authorized an investigation based on a complaint that alleges that *all* of an organization's communications may be coordinated if it turns out that evidence of coordination exists somewhere.



**C. Complainant's Common Vendor Coordination Theory Is  
Fatally Flawed**

The Complaint alleges that there is "an extensive data sharing program between party and supposedly independent organizations," Complaint at 9, which transforms every independent expenditure made by American Crossroads and Crossroads GPS into a coordinated communication that must be treated as an impermissible in-kind contribution to either the Republican National Committee, a state party committee, or a campaign committee. See Complaint at 14. More specifically, the Complainant asserts that "outside groups that are required to stay independent of the RNC are using the RNC's own data—via a common vendor, Data Trust—to produce targeted communications aimed specifically at persuading voters to support the RNC's candidates in an upcoming election." Complaint at 14; see also Complaint at 2 ("The move to a real time exchange of non-public, strategically material data through a common vendor constitutes 'coordination' under the Act ....").

Complainant's coordination theory rests on the faulty presumption that the coordinated communication's conduct prong test is satisfied through the use of a common vendor. See Complaint at 11-14. As Complainant explains, "[t]he third prong of the coordination analysis also appears to be satisfied *as the Data Trust and i360 have acted as a common vendor* for the RNC and American Crossroads, Crossroads GPS, AFP, and presumably other outside groups supportive of the Republican Party." Complaint at 12 (emphasis added). Complainant, however, does not carefully consider the requirements of the Commission's common vendor regulation.

First, the "common vendor" standard applies only to commercial vendors that provide certain, specified services, and Data Trust is not one of these vendors. Second, a covered commercial vendor must have provided certain services to a candidate or party committee within the previous 120 days. To the best of our knowledge, Data Trust does not provide any of the specified services. Third, the Complaint presumes that "Data Trust and i360 are 'using' and 'conveying ... information about the campaign plans, projects, activities, or needs' of campaigns and parties that is 'material to the creation, production, or distribution of [a] communication.'" Complaint at 14. However, the information held in Data Trust's database that has been made available to American Crossroads and Crossroads GPS is not information of this nature.

**1. 11 C.F.R. § 109.21(d)(4)(i) – "Common Vendor"  
Definition**

Pursuant to the Commission's regulations, three paragraphs of regulatory language must be satisfied in order to establish a "common vendor" under 11 C.F.R. § 109.21(d). The first of these three paragraphs reads: "**The person paying for the communication, or an agent of such person, contracts with or employs a commercial vendor, as defined in 11 CFR 116.1(c), to create, produce, or distribute the communication.**" 11 C.F.R. § 109.21(d)(4)(i). This provision contains important

limitations to its scope, and by its plain terms, applies only to certain vendors who perform certain functions.

In the first post-BCRA coordination rulemaking, the Commission explained that “a common vendor is a commercial vendor who is contracted to create, produce, or distribute a communication by the person paying for that communication,” and “*this standard ... does not apply to the activities of persons who do not create, produce, or distribute communications as a commercial venture.*” Final Rule on Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 435, 436 (Jan. 3, 2003) (emphasis added).<sup>14</sup> Furthermore, “[t]he final rules in 11 CFR 109.21(d)(4) restrict the potential scope of the ‘common vendor’ standard *by limiting its application to vendors who provide specific services* that, in the Commission’s judgment, are conducive to coordination between a candidate or political party committee and a third party spender.” *Id.* at 436 (emphasis added). The Commission reiterated that “[t]he common vendor rule is carefully tailored to ensure that ... the following conditions must be met. First, under 11 CFR § 109.21(d)(4)(i), the person paying for the communication, or the agent of such a person, must contract with, or employ, a ‘commercial vendor’ *to create, produce, or distribute the communication.*” *Id.* (emphasis added). *See also* *Cao v. FEC*, 688 F. Supp. 2d 498, 514 (E.D. La. 2010) (“The conduct standard is met if ... the person paying for the communication hires a candidate’s vendor or former employee ‘to create, produce, or distribute’ it and in doing so that vendor/employee uses ‘material’ information about ‘campaign plans, projects, activities, or needs or shares such information with the payer.’”).

**a. “Commercial Vendor”**

In one recent matter, the Office of General Counsel disregarded both the plain language of the common vendor regulation and the Commission’s explanations of that regulation, and recommended that the Commission ignore the predicate requirements of 11 C.F.R. § 109.21(d)(4)(i). *See* MUR 6277 (Kirkland), First General Counsel’s Report at 13 (contending that the “common vendor” provision includes unpaid volunteers). The Office of General Counsel suggested that “the Commission has not ... expressly limited the term ‘common vendor’ as excluding volunteers,” notwithstanding the fact that the regulation refers to a “commercial vendor,” *see id.*, and the 2003 Explanation and Justification made clear that the Commission had in fact expressly limited the term “common vendor” to exclude volunteers. *See* Final Rule on Coordinated and Independent Expenditures, 68 Fed. Reg. at 436 (“this standard only applies to a vendor whose usual and normal business includes the creation, production, or distribution of communications, and does not apply to the activities of persons who do not create, produce, or distribute communications as a commercial venture”).

<sup>14</sup> *See also* Final Rule on Coordinated Communications, 71 Fed. Reg. 33,190, 33,203 (June 8, 2006) (“The ‘common vendor’ conduct standard in the 2002 coordination rules is satisfied if (1) the person paying for a communication contracts with, or employs, a ‘commercial vendor’ *to create, produce, or distribute the communication...*”) (emphasis added).

The Commission rejected OGC's attempt to rewrite the regulation and expand its scope. See Statement of Reasons of Vice Chair Hunter and Commissioners McGahn and Petersen in MUR 6277 (Kirkland) at 8 n.24 ("A majority of the Commission supported deleting the common vendor analysis as a basis for the Commission's findings."). As three Commissioners succinctly explained, "the common vendor standard cannot be met when there is no common vendor."

**b. "Create, Produce, or Distribute"**

The phrase "to create, produce, or distribute" is not a defined term of art in the Commission's regulations, and is used by the Commission only in the coordination context. The phrase "created, produced, or distributed" first appeared in the Commission's pre-BCRA coordination rulemaking and then in the Commission's 2000 regulation on coordination. See Supplemental Notice of Proposed Rulemaking on General Public Political Communications Coordinated With Candidates, 64 Fed. Reg. 68,951 (Dec. 9, 1999); 11 C.F.R. § 100.23(c)(2) (2000). The terms "produce" and "distribute" appear to derive from *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999), which repeatedly uses those words in the context of the Christian Coalition's voter guide and direct mail programs. For example, the District Court noted that, "[t]he Coalition produced and distributed nearly 40 million voter guides prior to the November 1992 election," and "[a] separate version of the Senate guide was produced for distribution in Catholic churches." *FEC v. Christian Coalition*, 52 F. Supp. 2d at 73, 78. Christian Coalition does not use the term "create" in the same context.

In its pre-BCRA coordination rulemaking, the Commission did not discuss the meaning of the words "create," "produce," or "distribute," or in any way explain why those three words were chosen for inclusion in the coordination regulation. The Commission explained that the proposed rules were intended to "incorporate ... the standard articulated ... in the *Christian Coalition* decision." Supplemental Notice of Proposed Rulemaking on General Public Political Communications Coordinated With Candidates, 64 Fed. Reg. at 68,951. We assume the Commission used "produce" and "distribute" because the court in *Christian Coalition* used those terms. We have no idea why these two words were supplemented with the word "create." There is no indication in any Commission materials that these words have any legal meaning that is different from their plain language, dictionary definitions.<sup>15</sup>

<sup>15</sup> The phrase "create, produce, or distribute," or a close variation thereof, appears elsewhere in the U.S. Code and in judicial decisions. For example, Federal communications law defines a "satellite cable programming vendor" as "a person engaged in the *production, creation, or wholesale distribution* for sale of satellite cable programming, but does not include a satellite broadcast programming vendor." 47 U.S.C. § 548. Additionally, the Supreme Court used the phrase "create, produce, or distribute" in a 2005 decision regarding copyright infringement. See *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 959 (2005) ("Inventors and entrepreneurs (in the garage, the dorm room, the corporate lab, or the boardroom) would have to fear (and in many cases endure) costly and extensive trials when they *create, produce, or distribute* the sort of information technology that can be used for copyright infringement.") (emphasis added). (continued)

Merriam-Webster defines "create" to mean "to make or produce (something)," "to cause (something new) to exist," "to cause (a particular situation) to exist," and "to produce (something new, such as a work of art) by using your talents and imagination."<sup>16</sup>

The word "produce" means "to make (something) especially by using machines," "to make or create (something) by a natural process," "to cause (something) to exist or happen," "to cause (a particular result or effect)," "to give birth or rise to," "to oversee the making of," "to compose, create, or bring out by intellectual or physical effort," and "to bear, make, or yield something."<sup>17</sup> "Create" and "produce" are largely synonymous, and it is unclear if the Commission intended to convey different meanings, and if so, what those different meanings might be.

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A few other courts have used the same terminology, but never in a manner that suggests the terms themselves carry any special significance. See, e.g., *Davidson v. Time Warner*, 1997 U.S. Dist. LEXIS 21559 (S.D. Tex. Mar. 28, 1997) ("Defendant Time Warner argues this Court may not exercise personal jurisdiction over it because (1) it has insufficient minimum contacts with Texas for the purposes of general jurisdiction, and (2) the Court cannot exercise specific jurisdiction because Time Warner had no involvement in the creation, production or distribution of *2Pacalypse Now*."); *Hutchinson v. Essence Communications, Inc.*, 769 F. Supp. 541, 548 (S.D.N.Y. 1991) ("ECI has never used the name ESSENCE in connection with the creation, production or distribution of live, video taped or recorded musical performances."); *Schuchart & Associates, Professional Engineers, Inc. v. Solo Serve Corp*, 540 F. Supp. 928, 942 (W.D. Tex. 1982) ("Plaintiffs further charge that 'Defendants, through their agents or employees in the course of conspiracy with other Defendants, willfully and deceptively engaged in unfair competition practices in that the Defendants did not independently create, produce or distribute said architectural and engineering drawings and specifications, but sought to reap where they had not sown by deceptively and fraudulently utilizing the work product of Plaintiffs.'").

Despite the occasional appearance of the phrase in other legal contexts, "create, produce, or distribute" does not appear to be an established term of art in any area of the law. Most importantly, the Commission has not defined it, nor has the Commission ever indicated that it looks to other sources for these terms' meaning. See, e.g., Advisory Opinion 2013-07 (Winslow II) ("The term 'spouse' is not defined in FECA or the Commission's regulations. The Commission has previously relied on state law to supply the meaning of terms not explicitly defined in FECA or Commission regulations."); Advisory Opinion 2008-05 (Holland and Knight) ("Neither the Act, Commission regulations, nor the Act's legislative history define 'corporation' or 'partnership.' Instead, the Act's legislative history and Commission regulations rely on State law to distinguish a partnership from a corporation."). We have every reason to believe, then, that all three terms (create, produce, and distribute) are defined by reference to their ordinary meanings.

<sup>16</sup> See <http://www.merriam-webster.com/dictionary/create>.

<sup>17</sup> See <http://www.merriam-webster.com/dictionary/produce>.

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Finally, "distribute" means "to give or deliver (something) to people," "to divide (something) among the members of a group," and "to divide among several or many."<sup>18</sup>

**c. Data Trust Is Not A "Common Vendor"**

Data Trust does not qualify as a "common vendor" under the Commission's regulations. American Crossroads and Crossroads GPS never contracted with, or employed, Data Trust "to create, produce, or distribute" any communication. Data Trust is not this kind of vendor – it cannot be hired, retained, employed, or contracted with to "create, produce, or distribute" a communication. As explained above, Data Trust maintains a database, nothing more. Accordingly, Data Trust cannot be a "common vendor" because the "standard ... does not apply to the activities of persons who do not create, produce, or distribute communications as a commercial venture." Final Rule on Coordinated and Independent Expenditures, 68 Fed. Reg. at 436.

Virtually all of the Commission's past enforcement matters that considered allegations of "common vendor" coordination involved vendors who unquestionably "created, produced, or distributed" public communications for a paying client. *See, e.g.*, MUR 5502 (Martinez) (involving alleged common vendor that produced television and radio advertisements); MUR 5598 (Swallow) (involving alleged common vendor that produced brochures); MUR 5823 (Schwarz) (involving alleged common vendor that produced television and radio advertisements); MUR 6050 (Boswell) (involving alleged common vendor that produced direct mail); MUR 6077 (Coleman) (involving alleged common vendor that produced television and newspaper advertisements); MUR 6570 (Berman) (involving alleged common vendor that produced slate card mailer).

The Office of General Counsel should not attempt to expand the existing definition of "common vendor" in order to support a recommendation that concludes that Data Trust is a "common vendor." Data Trust does not "create, produce, or distribute" public communications. Both the plain language of the regulation, and the regulation's three Explanations and Justifications make absolutely clear that the regulation "only applies to a vendor who usual and normal business includes *the creation, production, or distribution of* communications, and does not apply to the activities of persons who do not create, produce, or distribute communications as a commercial venture." Final Rule on Coordinated and Independent Expenditures, 68 Fed. Reg. at 436 (emphasis added). The Commission should adhere to the plain language of 11 C.F.R. § 109.21(d)(4)(i), as that language has been previously explained in the Federal Register, and find that there is no reason to believe that the Respondents violated the Act.

**2. 11 C.F.R. § 109.21(d)(4)(ii) – Prior Services**

If a commercial vendor satisfies the requirements of 11 C.F.R. § 109.21(d)(4)(i), the Commission's regulation next asks whether that commercial vendor "provided any of the following services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, or the candidate's opponent, [or] the opponent's

<sup>18</sup> See <http://www.merriam-webster.com/dictionary/distribute>.

authorized committee, or a political party committee, during the previous 120 days.” 11 C.F.R. § 109.21(d)(4)(ii). The covered services are: (A) Development of media strategy, including the selection or purchasing of advertising slots; (B) Selection of audiences; (C) Polling; (D) Fundraising; (E) Developing the content of a public communication; (F) Producing a public communication; (G) Identifying voters or developing voter lists, mailing lists, or donor lists; (H) Selecting personnel, contractors, or subcontractors; or (I) Consulting or otherwise providing political or media advice. *Id.* The regulation specifically identifies these services, because “[p]roviding these services places the ‘common vendor’ in a position to convey information about the candidate’s or party committee’s campaign plans, projects, activities, or needs to the person paying for the communication where that information is material to the communication.”—Final Rule on Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 436 (Jan. 3, 2003).

The Complainant identifies one national party committee, three state party committees, and 24 candidates who either contracted with, or appear to have contracted with, either Data Trust or i360. The Complainant asserts that Data Trust and i360 both “identify[] voters and develop[] voter lists, mailing lists, or donor lists.” *See* Complaint at 13 (“the Data Trust provides the RNC with services to ‘identify voters’ and ‘develop lists’ on a continuous basis, using the most valuable voter data available”).

The Complainant appears to be incorrect. In American Crossroads’ and Crossroads GPS’s experience, Data Trust does not provide the service of “identifying voters or developing voter lists, mailing lists, or donor lists,” that is, of creating *usable* voter, mailing, or donor lists. To the contrary, Data Trust maintains a single database that may be segmented in any number of ways using the data fields that exist for each individual found in the database. This segmenting is performed at the request of a client, and solely in response to a client’s request. To the best of our knowledge, Data Trust does not itself exercise any independent judgment in connection with the preparation of specific voter or mailing lists for clients, and Data Trust’s database does not include donor information. Data Trust’s database is not a *usable* product in and of itself. Rather, it is capable of yielding a usable product when a client exercises independent judgment to generate a smaller list, consisting of specific, targeted universe of individuals, from a much larger list of all voters. Accordingly, we do not believe that Data Trust satisfies the regulatory requirement at 11 C.F.R. § 109.21(d)(4)(iii).

### **3. 11 C.F.R. § 109.21(d)(4)(iii) – Information Used or Conveyed**

The Complainant repeatedly asserts that the respondents are engaged in the “ongoing exchange of *non-public strategic campaign and party data*.” Complaint at 2; *see also id.* at 2 (“real time exchange of non-public, strategically material data”); *id.* at 3 (“operating by using the same data, and exchanging all of their information related to that data in real time”); *id.* at 7 (“sharing voter data”); *id.* at 8 (“the party and campaigns are also giving their data to the outside groups”); *id.* at 9 (“extensive data sharing program”); *id.* at 19 (“sharing real time information to enhance the effectiveness of targeted communications”).

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The Commission's coordination regulations do not apply to "strategic data," and in fact, there is no such thing. "Data" is not inherently strategic; rather, data is used strategically. 11 C.F.R. § 109.21(d)(4)(iii) refers to use or conveyance of "information about the campaign plans, projects, activities, or needs" of candidates and party committees. See Final Rule on Coordinated and Independent Expenditures, 68 Fed. Reg. at 436 ("This regulation focuses on the sharing of information about plans, projects, activities, or needs of a candidate or political party through a common vendor to the spender who pays for a communication that could not then be considered to be made 'totally independently' from the candidate or political party committee."). The coordination regulation is *only* concerned with the "data" that is housed in Data Trust's database to the extent that it constitutes "information about the campaign plans, projects, activities, or needs" of candidates and party committees. Simply put, raw data does not, in and of itself, constitute "information about the campaign plans, projects, activities, or needs" of candidates and party committees, and raw data does not convey such information. The Commission should not accept the Complainant's assertion that there is any such thing as "*strategic* campaign and party data" that is somehow subject to the coordination restrictions. See Complaint at 2. This is a phrase and concept that the Complainant has introduced in the hopes that the Commission will overlook the obvious fact that there is a crucial difference between "information about the campaign plans, projects, activities, or needs" of candidates and parties and the basic raw data contained in a database.

The Complaint does not include any discussion of what information is actually covered by the Commission's common vendor regulation, but simply assumes that whatever "data" is maintained by Data Trust (and presumably i360) is the type of "information" described at 11 C.F.R. § 109.21(d)(4)(iii). We believe this assumption is flatly incorrect. In the experience of American Crossroads and Crossroads GPS as customers of Data Trust, the vast majority of information contained in the Data Trust database derives from freely available public sources: voter registration rolls; voter history logs; phone numbers and street addresses; census information; and geographical information. The database also contains consumer data, which can be purchased by anyone from any number of sources. The compilation of this kind of information in a database is not captured by the nine vendors services listed in section 109.21(d)(4)(ii). Furthermore, the regulation provides that it is *not* satisfied if "the information material to the creation, production, or distribution of the communication used or conveyed by the commercial vendor was obtained from a publicly available source." 11 C.F.R. § 109.21(d)(4)(iii). To the extent that most of the information in a voter database is otherwise publicly available identification and demographic information, and "was obtained from a publicly available source," it is beyond the scope of the Commission's common vendor regulation.

**D. Complainant Does Not Allege Any Other Conduct That Could Result In Coordination Under 11 C.F.R § 109.21(d)**

As noted, Complainant's allegations are premised entirely on a "common vendor" theory of coordination. The Complainant does not allege violations through any of the other conduct prongs. There is no suggestion in the Complaint that any communication was created, produced, or distributed by American Crossroads or Crossroads GPS at the request or suggestion of, or following one or more *substantial discussions* about, any candidate or political party committee, or that any candidate or political party committee was *materially involved* in decisions regarding any such communication. See 11 C.F.R. § 109.21(d)(1), (2), (3). ~~No former employees or independent contractors are mentioned in~~ the Complaint. See 11 C.F.R. § 109.21(d)(5).

Complainant alleges *only* that communications were coordinated through a *common vendor*. The Commission should not undertake a fishing expedition in the hopes of pursuing conduct prong theories not alleged. Additionally, the regulatory standard set forth at 11 C.F.R. § 109.21 is the sole standard for determining whether a communication is a coordinated communication. See Advisory Opinion 2011-23 (American Crossroads), Statement of Vice Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen ("11 CFR 109.21 is the only proper analytical framework to determine whether communications are coordinated").

In short, Data Trust is not a "common vendor," and where there is no common vendor, there can be no coordination on the basis of a common vendor. Complainant does not even allege that any other provision of the conduct prong is implicated, and where the conduct prong is not satisfied, there can be no coordinated communication. See MUR 6296 (Buck), Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen at 4 ("Importantly, all three parts of the [coordination] test must be satisfied; if one part is not satisfied the analysis ends."). Thus, *even if every inaccurate or speculative statement in the Complaint were true*, there would still be no impermissible coordination under the Commission's regulations because the conduct prong is not satisfied.

**IV. Conclusion**

For the reasons set forth above, this Complaint should be dismissed.

Sincerely,



Thomas J. Josefiak  
Michael Bayes

Counsel to American Crossroads and  
Crossroads GPS